



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC PETITION NO. EO2 OF 2021**

**IN THE MATTER OF: ARTICLES 1 (1), (3), (c) & (4), 2 (1) (5) and (6), 3, (1) & (2) 10, (2) (a), (b), (c) & (d), 19 (1), (2), (3) (a), (b) & (c), 20 (1), (3), (a) & (b), (4), (a), (b) & (5) (a), (b) & (c) 21 (1), (2), (3), (a), (b) & (4), 22 (1), (2), (a), (b), (c) & (d), (3), (a), (b), (c), (d) & (e) & (4), 23 (1), (2) (3) (a), (b), (c) & (e) 24 (1) (a), (b), (c), (d) & (e), (2), (3) (4) & (5), 28, 35 (1), (2) & (3), 40 (1), (2), (a), & (b), (3), (a), (b), (4), (5) & (6), 42 (a) & (b), 43 (1), (a), (b), (c), (d) (e) & (f) (2) & (3) 48, 50 (1), 60 (1) (a), (b), (c), (d), (e), 9f) & (g), (2): 66 (1) & (2): 69 (1) (a), (d), (f), (g) & (h), (2) 70, (1), (2), (a), (b) & (c) (3) 162, (2) (b) 258 (1) (2) (a), (b), (c) & (d) AND 259 (1) (a), (b), (c) & (d) (2), (3) (a), (b), (c) & (d) (4), (5), (6), (7), (8), (9), (10) & (11) OF**

**THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF VIOLATION, DENIAL, TREAT & CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS UNDER ARTICLES 26, 40, 42 AND 43 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION NO. 8 OF**

**1999**

**AND IN THE MATTER OF MINING ACT NO. 12 OF 2016**

**AND**

**IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING (NO. 13 OF 2019).**

**AND**

**IN THE MATTER OF THE LAND CONTROL ACT CAP 302**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT (NO. 19 OF 2011).**

**AND**

IN THE MATTER OF: THE MINING (LICENCE AND PERMIT)

REGULATIONS, 2017

AND

IN THE MATTER OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT)

REGULATIONS 2003.

AND

IN THE MATTER OF THE VIOLATION OF RIO DECLARATION ON ENVIRONMENT

AND DEVELOPMENT (1992)

AND

IN THE MATTER OF: THE VIOLATION OF UNIVERSAL DECLARATION OF

HUMAN RIGHTS (UDHR)

AND

IN THE MATTER OF THE AFRICAN (BANJUL) CHARTER ON HUMAN

AND PEOPLES' RIGHTS.

BETWEEN

GEORGE OGAYO ORODI.....1<sup>ST</sup> PETITIONER

MAURICE OCHOLA BABU.....2<sup>ND</sup> PETITIONER

TITO ODINDO BABU.....3<sup>RD</sup> PETITIONER

BENARD BABU.....4<sup>TH</sup> PETITIONER

DAVID BABU.....5<sup>TH</sup> PETITIONER

VITALIS OCHIENG ADIDA.....6<sup>TH</sup> PETITIONER

CHARLES OMONDI OYAYA.....7<sup>TH</sup> PETITIONER

MOSES OYAYA.....8<sup>TH</sup> PETITIONER

ALFRED OGINGA AOMITI.....9<sup>TH</sup> PETITIONER

GEORGE ONDIKO.....10<sup>TH</sup> PETITIONER

GEORGE AWINO.....11<sup>TH</sup> PETITIONER

WILLIS OLOO.....12<sup>TH</sup> PETITIONER

VERSUS

EMMANUEL OYIER OYUGI.....1<sup>ST</sup> RESPONDENT

CABINET SECRETARY, MINING AND PETROLEUM...2<sup>ND</sup> RESPONDENT

THE NONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

**THE DIRECTOR OF MINES AND GEOLOGY.....4<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL ENVIRONMENTAL AUTHORITY..... INTERESTED PARTY**

**RULING**

**THE PETITIONERS CASE**

The petitioner has filed the application dated 28<sup>th</sup> January 2021 seeking a conservatory order of temporary injunction restraining the 1<sup>st</sup> Respondent, its agents and/or assigns or any of them from conducting and/or continuing with any form of mining activity on land Reference Number SIAYA/ABOM/646 and its environs Abom area in Bondo Constituency, Siaya County pending hearing and determination of this suit. Costs of the application be provided for. The application is supported by the grounds on the face of the application and the supporting affidavit sworn by George Ogayo Orodi on behalf of the petitioners.

It is the petitioners' contention that the first Respondent was conducting illegal mining on the subject piece of land having not conducted an environmental impact assessment and without seeking the requisite approvals.

That therefore as a result of the unlawful mining activities the petitioners/applicants had been affected in a myriad of ways including but not limited to, having cracked walls, noise pollution, being exposed to respiratory ailments, water pollution and general environmental degradation.

It was the petitioners'/applicants' further contention that despite numerous pleas to the 1<sup>st</sup> Respondent to cease his activities he has refused to do so thereby violating the petitioners'/Applicants' fundamental rights.

He annexed copies of pictures showing the destruction caused by the mining, a copy of a demand letter to the 1<sup>st</sup> Respondent, the signed petition and a report by the 3<sup>rd</sup> Respondent on the illegal mining activities.

**RESPONDENTS' CASE**

Vide a memorandum of appearance dated 10<sup>th</sup> of February 2021 the firm of M/s Oguso and Okungu Advocates came on record for the 1<sup>st</sup> Respondent. There however seems to be no entry of appearance on behalf of the 2<sup>nd</sup> to 3<sup>rd</sup> Respondents either by themselves or by counsel.

The 1<sup>st</sup> respondent filed a replying affidavit stating that he has never at any time in place operated Mining or Mining Activities through himself agents, servants and as such the notice of motion as herein presented has been presented to the wrong party.

He further states that Abom area is beehive of activities that small scale mining activities are conducted by small individuals and that it would be proper to acknowledge each and every person carrying out mining activities. The applicants herein are being economical with the truth facts and particulars are well within their knowledge.

He is the registered proprietor of land parcel number SIAYA/ABOM/646 within Bondo Constituency in Siaya County and has a title Document to that effect which gives him proprietary rights over the same property.

There is no mining activity taking place in his parcel of land through himself and or any other person through his authority and as such the assertion of the Applicants herein is neither here nor there.

He states that if there was a breach of any nature on his part in as far as mining nature in Abom, the local authority, the Director of mines and geology together with National Environment Management Authority (NEEMA) are mandated under the law and acts of parliament to take action on the offenders. In the premises in the absence of such prohibitions and in the absence of any report to the contrary the petitioner's assertions are a mere plethora of lies and a figment of imagination the petition.

He has never received any letter dated the 26<sup>th</sup> of October, 2020 from any advocate or any person purporting to instruct him in any way whatsoever.

He has had a chance looking at photographic WhatsApp images attached to the said application, there is nothing to show of those attached photos that the said photos emanated from Abom area or any area where mining is taking place within Bondo Constituency if anything those photos may have even been taken from Narok Nothing to show.

According to the first respondent, the application is directed to a wrong party. Further the structural cracks on the walls and buildings has got nothing to do with him.

The applicants herein have concealed material facts to this courts by playing victims to the mining activities with the sole intention of locking out their competitors in the mining business. If the applicants are sincere in their application, then nothing would be so difficult to apply to the government that all mining activities within Abom area of Bondo Constituency be stopped until further notice from the Cabinet secretaries.

## WHETHER THE APPLICANT IS DESERVING OF THE ORDERS SOUGHT

The applicant is seeking conservatory orders restraining the 1<sup>st</sup> Respondent from continuing with his mining activities. The issue therefore is whether the Applicant has established a prima facie case that warrants the grant of conservatory orders.

The law on the granting of conservatory orders is well articulated by Odunga J in Kevin K. Mwiti Others v Kenya School of Law & Others *stated*: as mentioned in the case of Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 others [2020] eKLR

*“The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable issues and, in this case, arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”*

The applicant has attached pictures showing the mining activities and cracks on the walls as a result of the mining activities however it is not clear that the photos emanate from the land Reference Number SIAYA/ABOM/646 and its environs Abom area in Bondo Constituency, Siaya County. The applicant has not annexed an expert report that the cause of the cracks is the alleged mining activities.

In the case of Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR also as mentioned in the case of Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 others [2020] eKLR(SUPRA) the court had this to say about the grant of conservatory orders:

*“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”*

The allegations by the petitioner are seriously controverted by the 1<sup>st</sup> respondent and therefore in the absence of an expert report I do find that the applicant has not met the test for grant of the conservatory orders. The 1<sup>st</sup> respondent has categorically denied that he is undertaking any mining activities on the land. I do decline to grant the conservatory orders. costs in the cause.

DATED AT KISUMU THIS 18<sup>th</sup> DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.

ANTONY OMBWAYO

JUDGE